

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLOVIS UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2014060342

DECISION

Clovis Unified School District (Clovis) filed a due process hearing request with the Office of Administrative Hearings, State of California, on June 4, 2014, naming Parent on Behalf of Student.

Administrative Law Judge Margaret M. Broussard heard this matter in Clovis, California, on July 1 and 2, 2014.

Karen E. Samman, Attorney at Law, represented Clovis. Mary Betry Bass, Clovis Special Education Local Plan Area Director, was present at all times during the hearing.

Mother represented Student. Student was not present during the hearing.

There were no continuances in this matter. Oral closing arguments were heard on July 2, 2014 and the matter was submitted.

ISSUE

May Clovis assess Student pursuant to the March 4, 2014 triennial assessment plan in the areas of intellectual development and adaptive behavior without parental consent?

SUMMARY OF DECISION

Clovis met its burden to show that it has a right and legal obligation to conduct intellectual development and adaptive behavior assessments as a part of Student's triennial

assessment. Clovis' March 4, 2014 assessment plan is appropriate, its assessor is qualified and the assessments are necessary.

FACTUAL FINDINGS

Background and Jurisdiction

1. Student is a 12-year-old girl who currently resides within the geographical boundaries of Clovis. Student has a diagnosis of Down Syndrome and is eligible for special education under the category of intellectual disability. Student's current educational placement is inclusion in general education with resource specialist, speech and language and assistive technology support. Student also has the assistance of a one-to-one instructional aide to support her in the general education setting.

2. Student last underwent assessment in the area of intellectual development six years ago when she was five years old. Although Clovis proposed to assess Student in the area of intellectual development for Student's triennial assessment when she was nine years old, Mother did not consent. Mother did consent, however, to assessment that year in the area of adaptive behavior.

Clovis's Attempts to Obtain Parental Consent

3. Clovis gave Mother an assessment plan for Student's triennial assessment on December 5, 2013. Clovis proposed to assess Student in the areas of academic achievement, health, intellectual development, language/speech communication, motor development, adaptive behavior, assistive technology and to conduct a classroom observation.

4. Mother returned the December 5, 2013 assessment plan with the areas of intellectual disability and adaptive behavior crossed out. She attached a written explanation of her unwillingness to agree to assessments in the areas of intellectual disability and adaptive behavior. In general, Mother believed that Clovis had sufficient information to determine that Student remained eligible for special education as a Student with an intellectual disability without conducting assessments in these areas. She expressed her concern that tests of intellectual development would not be accurate for her daughter, given some of the deficits caused by her Down Syndrome. Mother stated that the tests would only be useful if she wanted to remove Student from the regular education classroom to another setting, which she did not. Mother wanted Student to remain at her neighborhood school in the general education setting, where she was happy.

5. Mother indicated that the only areas she disagreed with were intellectual development and adaptive behavior, but did not sign consent for assessment in the areas she did agree with on the December 5, 2013 assessment plan.

6. Liza Gossett, Clovis Program Specialist, left a phone message for Mother on December 20, 2013 attempting to discuss Mother's concerns about Student's triennial assessment plan. It was the last day of school before the winter break and she did not hear back from Mother before she left for the break. When she returned to work after the break, Ms. Gossett called Mother on January 8, 2014, a few times on January 10, 2014, and again on January 15, 2014. Mother called Ms. Gossett back on January 16, 2014.

7. During their conversation on January 16, 2014, Mother informed Ms. Gossett that she would consent to assessment in all areas Clovis proposed to assess with the exceptions of intellectual disability and adaptive behavior. Ms. Gossett explained that Clovis believed it was necessary to conduct the intellectual disability and adaptive behavior assessments because it had been more than six years since Student's last intellectual development assessment. She also said that the individualized education program team needed an intellectual development assessment to help them understand Student as a learner. In particular, it would help the IEP team understand Student's rate of learning, memory and processing speed, as well as her verbal and non-verbal learning strengths and weaknesses. Ms. Gossett also explained to Mother that the adaptive behavior assessment would help the team understand how Student communicates, takes care of personal needs and gets along, socially at home, in school and in the community. She explained that it was important to understand if her adaptive functioning was consistent across settings. Ms. Gossett stated that the information from both assessments was necessary for the IEP team to determine Student's present levels of academic and functional performance, and whether additions or modifications was needed to Student's programming to enable her to meet her annual goals.

8. Ms. Gossett offered to put Mother in touch with Lisa Bath, the school psychologist who would perform the intellectual development and adaptive behavior assessments. Mother agreed to meet with Ms. Bath.

9. In order to timely complete the assessments Mother had consented to, the District developed another assessment plan on January 16, 2014. This assessment plan was identical the assessment plan from December 2013, but did not include intellectual development and adaptive behavior.

10. Mother met with Ms. Bath to discuss the proposed intellectual development and adaptive behavior assessments on January 21, 2014. Ms. Bath told mother that she wanted to use the Weschler Intelligence Scale for Children and the Universal Non-Verbal Intelligence Test to assess Student's intellectual development, and the Vineland to assess Student's adaptive behavior. She also explained that she might use other tests, depending on the results she obtained. She spent extensive time with Mother, showing her the specific test protocols and explaining to Mother which skills the assessments would test. She explained to Mother how the testing sessions would be held and answered all of Mother's questions.

11. During and after the meeting with Ms. Bath, Mother reiterated her position that the proposed intellectual development and adaptive behavior testing were not necessary

to determine Student's continued eligibility for special education and that the intellectual development testing would not be accurate for Student.

12. On January 21, 2014, Mother signed the January 16, 2014 assessment plan, which did not include intellectual development and adaptive behavior. On February 24, 2014, the IEP team met to discuss Clovis's continuing request to assess Student in the areas of intellectual development and adaptive behavior, its request to increase Student's resource time, and Student's access to curriculum and grading. Mother continued to reject assessment in both disputed areas.

13. On March 4, 2014, Ms. Gossett sent Mother a detailed letter asking again for permission to assess Student in the contested areas.¹ The letter set out the attempts Clovis had made to obtain permission and the reasons Clovis determined the assessments were warranted, and included another assessment plan including the contested areas for Mother's consideration. Although more than 15 days had passed since Clovis first proposed assessments in the contested areas, the letter informed Mother that she had an additional 15 days to consider the new assessment plan. Ms. Gossett offered to meet to address any further questions Mother might have about the assessments.

THE MARCH 4, 2014 ASSESSMENT PLAN

14. The March 4, 2014 assessment plan was accompanied by a notice of parental procedural rights. Student's and Mother's native language is English and the assessment plan was in English. The assessment plan is written clearly and plainly and in language easily understood by the general public. The assessment plan proposes to assess Student in the areas of intellectual development and adaptive behavior and explains what areas these tests would measure. Finally, the assessment plan notes that no special education services will be provided to Student without written parental consent.

15. On March 6, 2014, Student's triennial IEP team meeting was convened. The assessments that had been completed under the January 24, 2014 plan were discussed. The meeting took place over two days and an IEP was developed. However, the assessments that were completed and the IEP document noted that Clovis believed that the contested assessments were still warranted in order to develop an IEP for Student that was comprehensive and addressed all of her needs. During the IEP team meeting, Ms. Bath again discussed the assessment tools she was proposing to use and asked again for consent. Mother stated that she wanted to meet privately with Ms. Gossett to discuss the proposed assessments.

16. Mother and Ms. Gossett were scheduled to meet on March 12, 2014, to discuss the proposed assessments, but Mother did not appear for the meeting. Ms. Gossett spoke to

¹ Although the letter is dated February 4, 2014, the evidence showed that the date on the letter was a typographical error and that the letter was actually sent on March 4, 2014.

Mother on the telephone on March 28, 2014. Mother apologized for missing the meeting but reiterated she would not agree to the testing. However, in that phone call, Mother indicated that she would be amenable to intellectual development and adaptive behavior assessments of Student by an outside psychologist who did not work for Clovis. Clovis did not agree to use an outside psychologist.

17. Ms. Gossett sent a final letter to parent on May 16, 2014. Again, the reasons for requesting the assessments were set out with particularity. A copy of the March 4, 2014 assessment plan and procedural safeguards were included with the letter. Parent still did not consent to the assessments.

Are Assessments in Intellectual Development and Adaptive Behavior Warranted?

18. Ms. Bath established through credible testimony that a child's intellectual ability does not become stable until somewhere around the ages of eight or nine. Ms. Bath's testimony was thoughtful, consistent and undisputed, and no weaknesses emerged on cross-examination. Student was five years old the last time she was assessed in intellectual ability. Ms. Bath also established that the testing from six years ago would not be reliable for current use and that the IEP team could not rely on the older testing to make any decisions about Student's present cognitive strengths and weaknesses.

19. Student's eligibility category is intellectual disability. In order to determine whether Student continues to be eligible under that category, the IEP team must determine whether she has significantly below average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, which adversely affect her educational performance. The proposed assessments are required for the IEP team to have the information they need to make this determination.

20. The evidence showed that the disputed assessments are also warranted to determine Student's unique areas of strengths and weaknesses. They will assist the IEP team in determining Student's present levels of performance in many areas including her understating of concepts, rate of learning, memory, processing speed, verbal and non-verbal leaning strengths and weaknesses, receptive language, expressive language, written language, social skills, her ability to adapt to her environment and her coping skills. This information is important to help determine whether any additions or modifications are needed to Student's program, especially considering her placement in general education, her matriculation next year to sixth grade and then to junior high school, before the next triennial assessments.

21. Importantly, the adaptive behavior testing will also help measure Student's ability to generalize skills she does have across environments. This is important because if Student can perform an activity in one environment but not the other, the IEP team can concentrate on teaching Student to generalize that activity across environments. If Student cannot demonstrate a skill in any environment, the IEP team can concentrate on teaching the skill. If she can demonstrate a skill in all environments, then the IEP team can focus on

developing the next skill. The IEP team does not currently have this information for Student and this information will be available if the adaptive behavior assessment is completed.

22. Marya Livingston, speech and language therapist, credibly established that in order for her and the IEP team to interpret the speech and language assessment she completed on Student, she needs information regarding Student's current level of intellectual functioning. Ms. Livingston's testimony was clear, forthright and undisputed, and no weaknesses emerged on cross-examination. Her testing pursuant to the January 24, 2014 assessment plan revealed that Student has some articulation errors. However, in order to know whether Student has needs in articulation, it is important to determine whether her articulation is commensurate with her cognitive level. If it is, then she does not have needs in articulation, but if her articulation is less developed than her cognitive level, then she has needs in the area of articulation. For the same reason, Student's language scores cannot be correctly interpreted without knowing how they relate to her cognitive ability. The need for this information also establishes that the intellectual development testing is warranted for Student at this time.

Qualifications of the Proposed Assessor

23. Ms. Bath, school psychologist, is the proposed assessor for both the adaptive behavior and intellectual development testing. She is a credentialed school psychologist and has both a bachelor's and master's degree in psychology. She has been employed as a school psychologist for Clovis for the last 15 years; her first year as an intern and the last 14 as a school psychologist. She has received training in administering all of the assessments she uses and has done about 200 assessments in her career. She has assessed students with a wide range of disabilities and eligibility categories, including intellectual development. Ms. Bath credibly testified that she would assess Student in compliance with the requirements of California Education Code section 56320.

LEGAL CONCLUSIONS

Introduction – Legal Framework under the IDEA²

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)³ et seq.; Ed. Code, § 56000, et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education

² Unless otherwise indicated, the legal citations in the introduction and in the sections that follow are incorporated by reference into the analysis of each issue decided below.

³ All subsequent references to the Code of Federal Regulations are to the 2006 version.

and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of children with disabilities and their parent are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. The IDEA affords parent and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Here, Clovis bears the burden of proof.

ISSUE: May Clovis assess Student in the areas of intellectual development and adaptive behavior without parental consent?

IS THE ASSESSMENT NOTICE PROPER?

3. Reassessments require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1)). To obtain parental consent for a reassessment, the school district must provide proper notice to the student and his/her parent. (20 U.S.C. § 1414(b)(1); 20 U.S.C. § 1415(b)(3),(c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental procedural rights under the IDEA and related state law,. (20 U.S.C. §§ 1414(b)(1), 1415(c)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must be in a language easily understood by the public and the native language of the student; explain the assessments that the district proposes to conduct; and provide that the district will not implement an individualized education program without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4).) The district must give the parent at least 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

4. On March 4, 2014, Clovis provided the proposed triennial assessment plan to Parent with a copy of Parent's procedural rights. Clovis provided explanatory letters on March 4, 2014, and May 16, 2014. The March 4, 2014 assessment plan was in Student's and Parent's native language of English. The assessment plan identified the assessments that Clovis proposed to conduct. It explained that assessments were in conjunction with Student's triennial review. The assessment plan also explained that Parent's consent to assess was required and the evidence established that Clovis made reasonable efforts to obtain Parent's consent to the assessment plan and provided them at least 15 days to review

and sign it. All statutory requirements of notice were met and the assessment plan complied with the applicable statutes.

IS REASSESSMENT OF STUDENT WARRANTED?

5. The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parent and district agree otherwise, but at least once every three years unless the parent and district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(2).) A reassessment may also be performed if warranted by the child's educational or related service needs. (20 U.S.C. § 1414(a)(2)(A)(i); Ed. Code, § 56381, subd. (a)(1).)

6. The circumstances warrant the reassessment of Student in the areas of intellectual development and adaptive behavior. Student has not been assessed in the area of intellectual development in six years or in the area of adaptive behavior for three years. Although Mother does not believe a reassessment is necessary, Clovis proved that it is warranted. Clovis' proposed assessments will give the IEP team necessary and important data regarding Student's current levels of intellectual functioning; whether she continues to meet the eligibility category for intellectual disability; critical information regarding her present levels of performance in the areas of: understating of concepts, rate of learning, memory, processing speed, verbal and non-verbal abilities, receptive language, expressive language, written language, social skills, ability to adapt to her environment and her coping skills. It will help determine her needs in areas including articulation and language development, her ability to generalize her adaptive skills and her verbal and non-verbal learning strengths and weaknesses. They are also required to determine whether additional additions or modifications are needed as she moves into sixth grade and then onto junior high.

7. Mother's concerns that the assessments will not be accurate for Student were not supported by the evidence in this case and are speculative and premature.

WILL THE PROPOSED ASSESSMENTS BE CONDUCTED BY A COMPETENT PERSON?

8. Assessments shall be conducted by persons competent to perform the assessment, as determined by the local educational agency. Any psychological assessments of pupils shall be made in accordance with the California Education Code Section 56320 and shall be conducted by a credentialed school psychologist who is trained and prepared to assess cultural and ethnic factors appropriate to the pupil being assessed. (Ed. Code, §§ 56322 and 56324, subd. (a).)

9. Clovis's proposed assessor, Ms. Bath, is a credentialed school psychologist with 15 years of experience conducting assessments. She has been trained to perform the assessments and will comply with California Education Code section 56320. Ms. Bath is competent to perform the proposed assessments in the areas of intellectual development and adaptive behavior.

MAY THE DISTRICT ASSESS WITHOUT PARENTAL CONSENT, USING ITS OWN ASSESSOR?

10. If the parents do not consent to a reassessment plan, the district may conduct the reassessment by showing at a due process hearing that it needs to reassess the student and it is lawfully entitled to do so. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(ii)(2006); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).)

11. Parents who want their children to receive special education services must allow reassessment by the district, with assessors of its choice, and cannot force the district to rely solely on an independent evaluation. (*Johnson v. Duneland Sch. Corp.* (7th Cir.1996) 92 F.3d 554, 558; *Andress v. Cleveland Indep. Sch. Dist.* (5th Cir.1995) 64 F.3d 176, 178-79; *Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315.)

12. Clovis established that the March 4, 2014 assessment plan complied with all applicable statutory requirements and that the notice of the plan it gave Parent was proper. Clovis also established that the assessments are warranted and that Ms. Bath is competent to perform the assessments. Therefore, Clovis may assess Student over parental objection. Mother's position that she should be able to choose an independent assessor is not consistent with the requirements of the law and the District shall be allowed to use Ms. Bath to perform the assessments.

ORDER

1. Clovis is entitled to proceed with the intellectual development and adaptive behavior assessments proposed in the March 4, 2014 triennial assessment plan over the objection of Student's parent.

2. Clovis will notify parent, within 10 business days of the date of this decision, of the days and times Parent is to present Student for assessment. If Student is unable to attend on those days, parent will promptly communicate this to Clovis and the parties will mutually agree on days and times for the assessments to be conducted that are no more than 30 days from the dates that Clovis originally proposed.

3. Parent will timely complete and return any paperwork reasonably requested by Clovis as a part of this assessment.

4. If parent does not present Student on the days and times as specified above or does not complete any paperwork as specified above, Clovis will not be obligated to provide special education and related services to Student until such time as Parent complies with this order.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Clovis prevailed on the only issue heard and decided.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

Dated: July 17, 2014

/s/

MARGARET BROUSSARD
Administrative Law Judge
Office of Administrative Hearings